Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-554 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF OKLAHOMA,

Petitioner,

v.

ARTHUR J. TODD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
FROM THE OKLAHOMA COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT AND BRIEF OF RESPONDENT

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QUESTION PRESENTED

1. Whether the State of Oklahoma's Court of Criminal Appeals correctly interpreted Oklahoma's Constitution Article II, Section 21 and 21 O.S. §11 by prohibiting multiple punishments for a single criminal act and correctly proscribed subsequent prosecution under Oklahoma's statutory framework for first degree murder pursuant to 21 O.S. §701.7 (c) where a criminal defendant was previously tried by jury and convicted of the lesser included offense of child abuse pursuant to 21 O.S. §843 for a single offense.

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JURISDICTIONAL STATEMENT AND RESPONDENT'S BRIEF IN OPPOSITION

RELEVANT CONSTITITIONAL AND STATUTORY PROVISIONS

In addition to those statutory provisions set forth in the Petition for Writ of Certiorari, Respondent submits the following as relevant constitutional and statutory provisions:

Article II, Section 21 of the Oklahoma Constitution provides:

§21. Self-incrimination-Double jeopardy.

No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense.

21 O.S. Supp. 1986, §11 provides:

§11. Specific statutes in other chapters as governing-Acts punishable in different ways.

If there be in any other chapter of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this penal code. But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in §§51 and 54, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can

> he be punished under more than one; and an acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other law. (emphasis supplied).

JURISDICTIONAL STATEMENT AND RESPONDENT'S BRIEF IN OPPOSITION

Respondent submits that there exists adequate state statutory and constitutional basis for the Oklahoma Court of Criminal Appeals' decision. Further, that the decision rendered does not present a federal question or unresolved important question to federal law but rather an interpretation of Oklahoma's equivalent double jeopardy provision in Article II, Section 21 of the Oklahoma Constitution and interpretation of specific statutory provisions and their application to the facts of this particular case.

The Oklahoma Court of Criminal Appeals' interpretation of the statutory provisions in question, (i.e. - 21 O.S. §843 and 21 O. S. §701.7(c)) concerning the double jeopardy

issue is harmonious with constitutional statutory framework of Article II, Section 21 of Oklahoma Constitution and 21 O. S. §11.

The Oklahoma Court of Criminal Appeals has already determined, in accordance with Missouri v. Hunter, 103 S.Ct. 673, 679 (1983), that §843 and §701.7(c) constitute the "same offense" for purposes of double jeopardy under the Brown v. Ohio and Blockburger v. United States test requiring that each statute require proof of an additional fact which the other does not. (At page 6a, Appendix to Petition for Certiorari) As this Court has previously held, it is bound to accept a State Court's construction of that State's statutes. O'Brien v. Skinner, 414 U.S. 524, 531, (1974).

The Oklahoma Court of Criminal Appeals, in its opinion (at page 5a, Appendix to Petition for Certiorari), noted that:

> "The State concedes that prosecution for the greater offense of first

> degree murder - child abuse, would be precluded by double jeopardy principles under the general rule, since Petitioner (Respondent) has previously been convicted of the lesser offense of child abuse."

See Harris v. Oklahoma, 97 S.Ct. 2912, 2913 (1977).

Thus, no remand is necessary to determine whether 21 O.S. §843 is a lesser included offense of 21 O.S. §701.7 (c) as was the case in Illinois v. Vitale, 447 U.S. 410, 421 (1980).

In Whalen v. United States, 445 U. S. 684, (1980), this Court held that where two statutory provisions proscribed the same offense, they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

The judgment below, based upon a non-federal ground and involving an interpretation of state constitutional and statutory provisions by the highest State Court, was adequate to support the Court's finding and not repugnant the Constitution,

laws and treaties of the United States and therefore, should not be disturbed. (Herb v. Pitcairn, 324 U. S. 117 (1954))

The Respondent submits the singular question is one of State Constitutional law and statutory framework and that this Court has already determined that a State Constitution may provide more protection than the U. S. Constitution's 5th Amendment. Oregon v. Kennedy, 456 U.S. 667, 680-681, (1982) (Brennan, J., concurring). Thus, since Oklahoma's Constitutional and statutory provisions, as interpreted by the Oklahoma Court of Criminal Appeals, prohibit multiple punishments and prosecutions under these facts, there is no federal question upon which Petitioners may rely for jurisdiction to grant certiorari, pursuant to 28 U.S.C.A. §1257 (3), or Rule 17 of this Court.

Respondent submits that this Court has long held that it has no control over issues that are determined wholly on state grounds,

and has remanded cases repeatedly to State Courts for a determination of whether the decision was so based. Fox Film Corp v. Muller, 296 U. S. 207 (1935) and California v. Krivda, 409 U. S. 33 (1972).

Respondent would show that the cases urged by Petitioner in support of this subsequent multiple prosecution are clearly distinguishable in that those cases involve volitional action on the part of the Defendant in entering a plea of guilty to the lesser included or predicate felony and are thus distinguishable from Respondent's case in which he plead not guilty and was subsequently convicted in a trial by jury. The other cases urged by Petitioner are also distinguishable in that they involve federal decisions interpreting specific federal statutory schemes which provide specifically for multiple punishment for a single act. These cases involve Continuing Criminal Enterprise drug cases or RICO prosecutions.

The Petitioner herein raises no

substantial federal question which this Court should decide. Furthermore, the State Court judgment was based on non-federal grounds and in compliance with federal standards for specific statutory provision for multiple prosecutions and punishments for single criminal acts.

The Oklahoma Court of Criminal Appeals was able to render its decision on adequate and independent state grounds. Accordingly, the judgment of the Court below should stand and the request for this Court to grant Certiorari should be denied.

CONCLUSION

Respondent respectfully submits that the question upon which this cause depends is so unsubstantial as to not need further argument and adequate state grounds support the lower Court's decision. Since none of the grounds enumerated in this Court's Rule 17 justifying an appeal has been shown, Respondent respectfully moves the Court to

deny the request for certiorari or in the alternative, to affirm the judgment entered in the cause by the Oklahoma Court of Criminal Appeals.

Respectfully submitted:

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